ABDUL RAHMAN IBRAHIM A

v.

PENGARAH BESAR LEMBAGA KEMAJUAN TANAH PERSEKUTUAN B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-1273-2006] C
7 JANUARY 2010

ADMINISTRATIVE LAW: *Natural justice - Procedural fairness - Termination of service - Permanent and pensionable employee - Termination effected by recourse to short cut procedure of giving three months' salary - Whether flawed - Whether in breach of procedural fairness - Proper procedure - Whether to proceed by way of normal dismissal procedure - Land Development (Condition of Service of Officers and Servants) Regulations 1975, regs. 35, 48* D

This appeal essentially raised the question of whether the defendant/respondent ('FELDA') was right in law when it invoked reg. 48(a) of the Land Development (Conditions of Service of Officers and Servants) Regulations 1975, and not reg. 35 thereof, to terminate the services of the plaintiff/appellant, its permanent and pensionable employee. It was evident that unlike reg. 35, reg. 48 spoke of "probation and non-probation officers" and that FELDA, in resorting to same and giving the plaintiff three months' salary *in lieu* of notice, had been exempted by the said reg. 48 from giving any reason for the termination. It was, however, also undeniable that prior to the termination, FELDA had issued a show cause letter and even preferred charges against the plaintiff, and that the plaintiff too, had submitted a representation to exculpate himself of the charges – and further that – reg. 35 made it incumbent on FELDA to consider an officer's representation, before imposing the punishment of dismissal, demotion or any lesser punishment on him as the case may be. Such being the case, before the learned justices of the Court of Appeal herein, an issue also arose as to whether FELDA, in failing to resort to reg. 35, was guilty of procedural unfairness, thereby rendering its decision to terminate bad in law. E F G H I

Held (allowing appeal, setting aside High Court order and granting plaintiff's prayers)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The services of the plaintiff cannot be terminated by way of reg. 48. This is because the law has always recognized a distinction between a probation or contract employee from a confirmed or permanent employee. In the present case, it is not in dispute that the plaintiff was a confirmed and pensionable employee. Thus, the correct procedure for terminating the services of the plaintiff must be by way of dismissal as provided by reg. 35. Our view is fortified since FELDA had issued a show cause letter and had preferred charges against the plaintiff, the action which was followed by a representation by the plaintiff to exculpate himself of the charges. (paras 11-13)

(2) Under reg. 35(ii), it is incumbent upon the Chairman after receiving the representation to consider whether the conduct of the plaintiff would warrant a dismissal or reduction in rank, or to consider imposing such lesser punishment as he deems fit if the conduct in his opinion is not serious enough. None of these was however done. FELDA instead took a short cut by terminating the plaintiff's service by resorting to reg. 48. Clearly, FELDA had failed to follow the proper procedure as laid down by reg. 35 and had thus committed procedural unfairness. FELDA's action was thus bad in law. (para 14)

(3) To accede to FELDA's submission (that reg. 48 conferred FELDA the power to terminate the services of the plaintiff notwithstanding that he was a confirmed and pensionable employee) will lead to absurdity. It will lead to a situation where FELDA is at liberty to resort to reg. 48 to terminate all their officers or employees, notwithstanding they are confirmed or permanent employees. In that way, FELDA will be free of the burden of paying their pension and other retirement benefits to its officers or employees. That cannot be the position in law. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan di sini pada asasnya membangkitkan persoalan sama ada defendan/responden ('FELDA') betul di sisi undang-undang apabila ia menggunakan per. 48 Peraturan-Peraturan Pembangunan Tanah (Syarat-Syarat Perkhidmatan Pegawai-Pegawai dan Pekerja) 1975, dan bukannya per. 35 di situ, bagi menamatkan perkhidmatan plaintif/perayu, seorang pegawai tetap dan berpencennya. Adalah jelas bahawa tidak seperti per. 35, per. 48 bercakap mengenai "pegawai-pegawai percubaan dan bukan percubaan" dan bahawa FELDA, dalam menggunakan per. 48 dan memberikan plaintif tiga bulan gaji sebagai ganti notis, telah dikecualikan oleh peraturan tersebut dari memberi sebab atau alasan bagi penamatan perkhidmatan. Walau bagaimanapun, adalah juga tidak dinafikan bahawa sebelum penamatan perkhidmatan dilaksanakan, FELDA telah mengeluarkan surat tunjuk sebab dan malah telah mengemukakan beberapa pertuduhan terhadap plaintif, dan bahawa plaintif juga telah membuat representasi menyangkal pertuduhan-pertuduhan berkenaan – dan selanjutnya bahawa – per. 35 telah mewajibkan FELDA untuk mempertimbang apa-apa representasi yang dibuat oleh seseorang pegawai, sebelum menjatuhkan hukuman-hukuman buang kerja, turun pangkat atau hukuman-hukuman lebih ringan lain yang difikirkan sesuai. Dalam halkeadaan sedemikian, di hadapan yang arif hakim-hakim Mahkamah Rayuan di sini, persoalan turut berbangkit sama ada FELDA, atas kegagalannya menggunapakai per. 35, telah melakukan ketidakadilan prosedur sekaligus menjadikan keputusannya untuk menamatkan salah di sisi undang-undang.

Diputuskan (membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan membenarkan perintah-perintah yang dipohon plaintif)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Perkhidmatan plaintif tidak boleh ditamatkan melalui per. 48. Ini kerana undang-undang sentiasa memberi pengiktirafan kepada perbezaan di antara seorang pekerja percubaan atau kontrak dengan pekerja tetap. Dalam kes semasa, ianya tidak dinafikan bahawa plaintif adalah seorang pekerja yang disahkan dan berpencen. Oleh itu, prosedurnya yang betul adalah dengan menggunakan kaedah pembuangan kerja seperti yang

termaktub di dalam per. 35. Pandangan kami diperkukuhkan lagi apabila FELDA sendiri ada mengeluarkan surat tunjuk sebab serta menyenaraikan beberapa pertuduhan terhadap plaintif, tindakan mana menyebabkan plaintif mengemukakan representasi bagi melepaskan dirinya dari pertuduhan-pertuduhan tersebut.

(2) Di bawah per. 35(ii), Pengerusi bertanggungan, apabila menerima representasi, untuk menimbang sama ada kelakuan plaintif mewajarkan pembuangan kerja atau penurunan pangkat, ataupun menimbang sama ada mengenakan hukuman yang lebih ringan jika kelakuan plaintif didapati tidaklah sebegitu serius. Tidak satu pun dari kaedah-kaedah ini dilakukan. FELDA sebaliknya telah mengambil jalan pintas dengan menamatkan perkhidmatan plaintif melalui per. 48. FELDA jelas gagal mengikuti prosedur yang betul seperti yang tertera di per. 35 dan sekaligus melakukan ketidakadilan prosedur. Tindakan FELDA dengan itu adalah salah di sisi undang-undang.

(3) Menerima hujah FELDA (bahawa per. 48 memberikan FELDA kuasa untuk menamatkan perkhidmatan plaintif walaupun plaintif seorang pekerja tetap dan berpencen) akan membawa kepada kedangkalan. Ia akan membawa kepada situasi di mana FELDA bebas menggunakan per. 48 bagi menamatkan perkhidmatan semua pegawai-pegawai atau pekerja-pekerjanya, walaupun mereka pekerja-pekerja yang disahkan dan berpencen. Dengan cara ini, FELDA dapat membebaskan dirinya dari tanggungan membayar pencen serta lain-lain faedah persaraan kepada pegawai-pegawai atau pekerja-pekerjanya. Ini bukanlah keadaan yang sepatutnya wujud di sisi undang-undang.

Case(s) referred to:

Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor [2003] 1 CLJ 1 CA ***(refd)***

Government of Malaysia v. Lionel [1974] 1 MLJ 3 ***(refd)***

Mohd Najib Hj Ahmad v. Lembaga Padi dan Beras Negara [1998] 4 CLJ 405 CA ***(refd)***

Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:

Land Development (Conditions of Services of Officers and Servants) Regulations 1975, regs. 35, 48(a)

Rules of the High Court 1980, O. 14A

For the appellant - Haniff Khatri; M/s Haniff Khatri A
For the respondent - J Doshi; M/s Abdullah & Zainuddin

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2 (S9)(S4)-24-789-1994]

Reported by Wan Sharif Wan Ahmad B

JUDGMENT

Raus Sharif JCA: C

[1] This appeal came before us on 30 June 2009. We were then informed that the grounds of judgment of the learned trial judge was not available. We voiced out our concern as it is an old case which was filed in the High Court in 1994. Parties then agreed D that the appeal can be heard without the grounds of judgment.

[2] After hearing the parties we allowed the appeal. We now give our reasons. For convenience, we will call the appellant "the plaintiff" and the respondent "the defendant" or "FELDA" in this judgment. E

[3] The brief facts of the case are these. The plaintiff was an employee of the defendant, Pengarah Besar Lembaga Kemajuan Tanah Persekutuan ("FELDA"). He joined FELDA on 9 May 1974 as a clerk and was confirmed in his post on 2 July 1978. F Thereafter, by a letter dated 27 August 1984, he was placed under a pensionable scheme.

[4] Sometime in 1993 while the plaintiff was serving at Bahagian Pentadbiran, Pejabat FELDA Batu Lapan, Guar Napai Changloon, G Jitra, Kedah Darul Aman it was found that there were some irregularities on the accounts that he was in charge of. There was a shortfall and he was asked to make good of the shortfall. This, he did after some hesitations.

[5] Unfortunately for the plaintiff, it did not save his job. By a H letter dated 28 April 1993, FELDA terminated the plaintiff's services by paying him three months' salary *in lieu* of notice. His service was terminated under reg. 48(a) Land Development (Conditions of Services of Officers and Servants) Regulations 1975 ("regulations"). I

[6] On 4 October 1994, the plaintiff filed a civil suit against FELDA at the High Court in Kuala Lumpur *vide* (S6)(S4)24-78a-1994, claiming general damages, arrears of salary, allowances and other payments including pension benefits.

[7] At the High Court, pursuant to an application under O. 14A of the Rules of the High Court 1980 the following two questions of law were posed to the learned High Court Judge to decide:

> 1) Adakah penamatan perkhidmatan kerja plaintif oleh defendan berpandu kepada Kaedah 48 atau Kaedah 35 Land Development (Condition of Services of Officers and Servants) Regulations 1975: dan
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> 2) Sama ada defendan boleh menggunakan Kaedah 48 Regulations 1975 untuk menamatkan perkhidmatan plaintif, atau sama ada defendan adalah terikat dengan Kaedah 35 Regulations 1975 dalam setiap hal dan keadaan kes ini.

[8] In essence, what the court was called to decide upon was whether the plaintiff's services can be terminated by way of reg. 48 notwithstanding that he was a confirmed and pensionable employee.

[9] Before us, En. Haniff Khatri, learned counsel for the plaintiff submitted that reg. 48 cannot be used against the plaintiff. This is because the plaintiff was a confirmed and pensionable employee. According to him, for a confirmed and pensionable employee like the plaintiff, the applicable law is reg. 35 of Regulations 1975. Learned counsel for FELDA, Puan Doshi, on the other hand submitted that reg. 48 conferred FELDA the power to terminate the services of the plaintiff, notwithstanding that he was a confirmed and pensionable employee.

[10] In order to understand their arguments and for ease of reference, the respective regs. 35 and 48 are hereby reproduced:

> R.35. Where it is represented to the Chairman by the General Manager or is found by the Chairman that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Chairman, merits dismissal or reduction in rank, the following provisions shall apply:

(i) The Chairman shall after considering all the available information in his possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days a representation containing grounds upon which he relies to exculpate himself.

(ii) If after considering the said representation furnished by the officer the Chairman is of the opinion that the unsatisfactory work or conduct of the officer is not so serious enough to warrant dismissal or reduction in rank, the Chairman may impose upon the officer such lesser punishment as he may deem fit.

(iii) If the officer does not furnish any representation within the time fixed, or if he furnished a representation which fails to exculpate himself to the satisfaction of the Chairman, the Chairman shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(iv) Where the Chairman considers that the case against the officer requires further clarification he may appoint a Committee of Inquiry consisting of not less than two senior officers of the Authority who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry shall not be selected to be a member of the Committee.

(v) The officer shall be informed of the date at which the complaint against him shall be enquired into; and on such date he shall be entitled to appear before the Committee for the purpose of exculpating himself.

(vi) If witnesses are examined by the Committee, the officer shall be given an opportunity to question the witnesses.

(vii) The Committee, after such inquiry, shall make a report to the Chairman through the General Manager.

(viii) If, upon considering the report of the Committee, the Chairman is of the opinion:

(a) that the officer should be dismissed or reduced in rank, he shall forthwith direct accordingly;

A (b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, he may inflict upon the officer such lesser punishment as he may deem fit.

B R.48. Notwithstanding the foregoing regulations the Authority may at any time terminate the employment of any officer without any reason being assigned on giving the officers:

(a) in the case of an officer not on probation and drawing an inclusive salary of RM850.00 per month and above, three months notice in writing or on paying him three months C inclusive salary at the rate then payable *in lieu* of notice.

(b) in the case of an officer on probation or drawing an inclusive salary of less than RM850.00 per month, one month's notice in wring or one month's salary at the rate then payable *in* D *lieu* of notice.

[11] We are of the view that the services of the plaintiff cannot be terminated by way of reg. 48. This is because the law has always recognized a distinction between a probation or contract employee from a confirmed or a permanent employee (See *Zakiah* E *Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77, *Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor* [2003] 1 CLJ 1 and *Government of Malaysia v. Lionel* [1974] 1 MLJ 3). In the present case, it is not in dispute that the plaintiff was a confirmed and pensionable employee. Thus, the correct procedure for terminating F the services of the plaintiff must be by way of dismissal as provided by reg. 35.

[12] Our view is fortified by the action taken by FELDA in this case. FELDA on 17 March 1993 had issued a show cause letter G against the plaintiff (p. 138 of the appeal record). In the show cause letter, three charges were preferred against the plaintiff which were as follows:

(i) Secara sengaja telah mengambil wang tunai dari peti besi H rancangan Felda Guar Napai/Batu Lapan sebanyak RM1,464.00 untuk kepentingan peribadi.

(ii) Menyimpan wang Felda RM1,464.00 dalam tempoh melebihi 1 bulan dan wang berkenaan berada di tangan tuan walaupun telah pun bertukar ke rancangan Felda Bukit Tajau mulai 22 I Februari, 1993. Wang tersebut hanya diserahkan pada 8 Mac, 1993 setelah didesak oleh Pengurus.

(iii) Tuan telah membuat catatan palsu di rekod Kenyataan Aliran Wang pada 3 Februari 1993 dengan merekodkan urusan bayaran PH sebanyak RM1,464.00, padahal urusniaga tersebut tidak dilaksanakan dan tanpa dokumen sokongan yang perlu. Wang tersebut tuan ambil dan gunakan untuk urusan peribadi.

[13] By a letter dated 23 March 1993, the plaintiff explained the circumstances as to the irregularities to the accounts. He also explained the reason for the delay in making good the shortfall. In effect, the plaintiff had made a representation to FELDA to exculpate himself of the charges.

[14] Under reg. 35(ii) it is incumbent for the Chairman after receiving the representation to consider whether the conduct of the plaintiff would warrant a dismissal or reduction in rank. If the Chairman is of the opinion the conduct of the plaintiff is not serious enough, then the Chairman may impose on the plaintiff such lesser punishment as he may deem fit. However, if this fails to exculpate the plaintiff to the satisfaction of the Chairman, the Chairman has to proceed and consider and decide on the dismissal or reduction of rank of the plaintiff. But none of these were done. Instead, FELDA took a short cut by terminating the plaintiff's service by resorting to reg. 48. Clearly, FELDA had failed to follow the proper procedure as laid down by reg. 35. It amounts to procedural unfairness resulting the plaintiff being deprived his right to be heard. As there was procedural unfairness, it follows that FELDA's action cannot be supported as this is bad in law. The termination cannot be upheld (See *Mohd Najib Hj. Ahmad v. Lembaga Padi dan Beras Negara* [1998] 4 CLJ 405).

[15] Moreover, to accede to FELDA's submission will lead to absurdity. It will lead to a situation where FELDA is at liberty to resort to reg. 48 to terminate all their officers or employees, notwithstanding they are confirmed or permanent employees. In that way, FELDA will be free of the burden of paying their pension and other retirement benefits to its officers or employees. That cannot be the position of the law.

[16] It was for the above reasons that we allowed the plaintiff's appeal. We therefore set-aside the High Court order. We granted the plaintiff prayers as sought in the statement of claim which are as follows:

A (a) a declaration that the plaintiff's termination was null and void;

(b) the plaintiff is entitled to arrears of salaries, emolument and other benefits as provided under the contract of employment;

B (c) the plaintiff is entitled to be paid pension;

(d) all sum due to the plaintiff shall carry 8% interest; and

(e) costs here and at the court below. For costs before us and after hearing the parties we fixed it at RM5,000.

C **[17]** We also made an order that the case be sent back to the High Court for the senior assistant registrar to make the appropriate assessment in respect of the claims allowed in this appeal. Deposit to be refunded to the plaintiff.

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